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No. 82-739

In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS JUREN AND EDWARD W. CROMEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Energy properly issued subpoenas to petitioners in connection with an investigation of sales and exchanges of crude oil and refined products by petitioners' company.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 687 F.2d 493. The oral opinion of the district court (Pet. App. 16a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a) was entered on September 9, 1982. A petition for rehearing was denied on September 28, 1982 (Pet. App. 28a). The petition for a writ of certiorari was filed on October 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, incorporated by Section 5(a)(1)(A) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1)(A).

STATEMENT

Petitioners are officers of Tesoro Petroleum Corporation, a Texas corporation that engages in the production and refining of crude oil. The Department of Energy ("DOE") is charged by statute with enforcing the provisions of the Emergency Petroleum Allocation Act of 1973 ("EPAA") and regulations promulgated thereunder.[1] In July 1981, each petitioner was served with a subpoena ad testificandum, the purpose of which was to obtain information relating to a DOE investigation of sales and exchanges of crude oil and refined products by Tesoro and certain other firms during 1976 and 1977 (Pet. App. 32a-33a). Petitioners refused to comply voluntarily with the subpoenas.

DOE petitioned the United States District Court for the District of Columbia for enforcement of the subpoenas. Petitioners opposed enforcement, contending that (1) the district court lacked jurisdiction to enforce the subpoenas; (2) DOE had issued them for the purpose of obtaining information for use in a criminal proceeding; and (3) enforcement of the subpoenas would violate petitioners' Fifth Amendment privilege against compelled self-incrimination. DOE responded by submitting affidavits that indicated, *inter alia*, that (1) there were valid civil purposes for issuance of the subpoenas; (2) DOE had made no criminal referral to the Department of Justice of the matter under investigation; and (3) there had been no institutional determination to refer the case for criminal investigation (Pet.

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[1]On January 28, 1981, President Reagan removed price controls for crude oil and refined petroleum products. Exec. Order No. 12287, 46 Fed. Reg. 9909. On September 30, 1981, the authority to promulgate regulations and issue orders under the EPAA expired; however, the expiration does not affect actions or proceedings pending on that date or actions or proceedings based on acts committed prior to that date. 15 U.S.C. 760g.

App. 2a, 17a; R-198 to R-204).[2] On the basis of the DOE affidavits, the district court enforced the subpoenas and denied petitioners' request for discovery concerning DOE's purpose in issuing the subpoenas (Pet. App. 16a-19a).

Petitioners pursued appeals in both the United States Court of Appeals for the District of Columbia Circuit and the Temporary Emergency Court of Appeals ("TECA").[3] On July 13, 1982, the District of Columbia Circuit issued a decision rejecting peti tioners' contention that the district court lacked jurisdiction to enforce the subpoenas under Section 645 of the Department of Energy Organization Act

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[2]"R" refers to the record in the court of appeals, a copy of which petitioners have lodged with the Clerk of the Court (Pet. 4 n.3).

[3]The government contended that all of the issues raised by petitioners in their appeals were within the exclusive jurisdiction of TECA, since the subpoenas were issued as part of an investigation of possible violations of regulations promulgated under the EPAA. TECA's opinion does not refer explicitly to the threshold issue of jurisdiction, and petitioners do not present that issue as a question for review by this Court. The government continues to take the position that TECA, rather than the District of Columbia Circuit, had exclusive jurisdiction to decide all issues raised on appeal.

While the appeals were pending, petitioners filed a Fed. R. Civ. P. 60(b) motion, alleging the existence of newly-discovered evidence (Pet. App. 25a-26a). That evidence consisted of a memorandum written in March 1979 as a record of a meeting between DOE attorneys and attorneys in the Criminal Division of the Department of Justice concerning a different DOE investigation of Tesoro that had been pending in 1979. The memorandum of the meeting indicated that no decision had been made to refer that matter to the Justice Department for criminal prosecution (*ibid.*). At the hearing on the Rule 60(b) motion, DOE introduced affidavits that established that (1) the particular investigation referred to in the March 1979 memorandum had been closed without a referral to the Department of Justice, and (2) that investigation involved different facts than, and was conducted separately from, the investigation for which petitioners' subpoenas had been issued (Pet. App. 25a-26a). On the basis of these uncontroverted facts, the district court denied petitioners' motion for a new hearing (*ibid.*).

("DOEOA"), 42 U.S.C. (Supp. IV) 7255 (Pet. App. 4a-9a).[4] The District of Columbia Circuit declined to rule on petitioners' claims that the subpoenas were issued for an unlawful purpose and that their enforcement would violate petitioners' Fifth Amendment privilege against self-incrimination, on the ground that TECA had exclusive jurisdiction of these issues (Pet. App. 8a).

On September 9, 1982, TECA affirmed (Pet. App. 1a-3a) the district court's orders enforcing the subpoenas and rejecting petitioners' motions for discovery. TECA concluded that petitioners had "presented no evidence that DOE acted improperly" (*id.* at 2a). Subsequently, on October 5, 1982, the District of Columbia Circuit panel granted a petition for rehearing filed by petitioners and vacated its July 13 order. On November 9, after the petition for a writ of certiorari in the present case had been filed, the District of Columbia Circuit panel issued a new opinion in which it reversed its earlier conclusion that the district court had jurisdiction to enforce the subpoenas under Section 645 of the DOEOA. In its new opinion the panel stated that Section 645 "does not confer on federal district courts either subject matter jurisdiction or the power of extraterritorial service of process in DOE subpoena enforcement proceedings." *United States* v. *Hill*, 694 F.2d 258, 270 (D.C. Cir. 1982), rehearing denied (Jan. 14, 1983). The panel remanded the case for consideration of several alternative bases for the district court's jurisdiction, although it expressed the view that none of these alternative provisions conferred extraterritorial enforcement jurisdiction (*ibid.*).

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[4]The District of Columbia Circuit consolidated petitioners' appeals with those of Hill and Pinkerton, officers of the Hill Petroleum Company, who were also contesting subpoenas issued in connection with the DOE investigation.

ARGUMENT

1. The decision of the Temporary Emergency Court of Appeals is clearly correct, does not conflict with the ruling of any other court, and does not warrant further review.

a. The question presented for review by this Court (Pet. i) does not include a challenge to the factual findings of the courts below. However, much of the petition consists of an attempt to establish that, contrary to the conclusions of both the district court and TECA, DOE in fact had some improper criminal purpose in issuing the subpoenas. Thus, petitioners protest that there are "strong indications" that the subpoenas were issued solely for a criminal purpose (Pet. 13) and that there was at least sufficient evidence to warrant further inquiry (Pet. 16). But TECA specifically concluded that petitioners had presented "no evidence that DOE acted improperly" (Pet. App. 2a) and that petitioners had offered only "[u]nsupported allegations of bad faith and improper purpose" (*id.* at 3a).[5] TECA noted that both

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[5]The affidavit of Jeffrey R. Whieldon (R-198 to R-201), dated Feb. 11, 1982, submitted by DOE in the district court in response to petitioners' challenges to enforcement of the subpoenas and cited in the district court's oral opinion (Pet. App. 16a-17a), states that the subpoenas were issued in order to obtain information for a number of civil purposes, as well as to aid in the determination whether to make a referral to the Department of Justice for criminal investigation (paras. 15 and 6, R-200 and R-199); that there had been no "institutional determination" to make a referral to the Department of Justice at the time the subpoenas were issued (para. 16, R-201); and that the subpoenas were issued in futherance of an investigation "the good faith purpose of which was to determine whether there had been either civil or possible willful violations of the DOE regulations, or both" (*ibid.*). See also the affidavit of Jerome Wiener (R-202 to R-204), dated Feb. 11, 1982. In addition, affidavits by DOE officials filed in response to petitioners' Rule 60(b) motion stated that the "Tesoro/Young investigation," on which petitioners place considerable weight, was entirely separate from the investigation at issue in this case and in fact has been closed (Pet. App. 25a-26a; Whieldon affidavit of May 20, 1982; Sulton affidavit of May 20, 1982). TECA concluded that petitioners had presented "no evidence challenging the accuracy of the statements made in the affidavits" (Pet. App. 2a).

Judge Gesell and Judge Flannery on rehearing "found that [petitioners] had failed to meet the heavy burden of showing the extreme circumstances that would justify inquiry into the propriety of the subpoenas" (*id.* at 2a-3a).[6] Since petitioners have not sought review of the factual findings of the courts below, they should not be permitted to rewrite those findings at this stage. In any event, the concurrent findings of the two lower courts do not warrant review by this Court. See *Rogers* v. *Lodge*, No. 80-2100 (July 1, 1982), slip op. 10; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

b. Petitioners contend that the courts below gave undue consideration to whether there had been a decision to make a referral to the Department of Justice and thus used an incorrect legal standard in reaching the conclusion that DOE did not issue the subpoenas for an improper purpose. Petitioners rely primarily on *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), a case involving the authority of the Internal Revenue Service to issue summonses, in support of their argument that the critical consideration is not whether a decision has been made to make a referral, but rather whether there has been an " 'institutional commitment' to conduct a purely criminal investigation" (Pet. 16). In fact, *LaSalle* itself stresses the importance of the step of referral: "[W]e decline to impose the prophylactic restraint on the summons authority any earlier than at the [point in time of] recommendation to the Department of Justice." 437 U.S. at 313 n.15. The Court concluded that earlier imposition of a ban on use of the summons authority would "unnecessarily hamstring the performance" of the civil functions of the IRS (*ibid.*). The Court stated, however, that it would not countenance a delay in referring a

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[6]Of course, "those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil * * * purpose." *United States* v. *LaSalle National Bank*, 437 U.S. 298, 316 (1978).

case to the Justice Department "when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution" and that the IRS should not "become an information-gathering agency for other departments" (437 U.S. at 316-317).

Assuming arguendo that the Court's statements in *LaSalle* apply to subpoenas issued by DOE,[7] the courts below properly applied that test, citing the affidavits in which DOE officials stated that there had been no institutional

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[7]As the Court noted in *LaSalle*, the validity of summonses and subpoenas "depend[s] ultimately on whether they were among those authorized by Congress," 437 U.S. at 307. See also *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1378-1379 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980). DOE has broader statutory authority in this respect than the authority of the IRS under 26 U.S.C. 7602, at the time of the decision in *LaSalle*. See, *e.g.*, Section 13(d) and (e)(1) of the Federal Energy Administration Act of 1974, 15 U.S.C. 772(d) and (e)(1) (authorizing DOE to obtain, by means of subpoenas or otherwise, information necessary for a designated official to perform his functions); Section 206 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, (referring to subpoena power "for any purpose related to this title"), which is incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1), as amended; Section 645 of the Department of Energy Organization Act, 42 U.S.C. (Supp. IV) 7255 (referring to subpoena power for "the purpose of carrying out the provisions of this chapter"). Thus, it is questionable whether all of the Court's statements in *LaSalle* about limitations on the IRS would necessarily apply to DOE.

Congress recently overruled in part the restrictions imposed on the IRS by *LaSalle* by amending 26 U.S.C. 7602. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Section 333(a), 96 Stat. 622 (providing that the purpose of issuing summons may include inquiry into any offense connected with the administration or enforcement of the internal revenue laws, and that issuance of summons is prohibited during the time a Justice Department referral is in effect). See also S. Rep. No. 97-494, 97th Cong., 2d Sess. 285-287 (1982).

commitment to refer the investigation to the Justice Department and concluding that petitioners had failed to demonstrate that DOE had an improper purpose. See p. 5 n.5. In any event, petitioners cannot succeed even under the standard they advocate — whether there has been an institutional commitment to make a purely criminal investigation — since the uncontroverted affidavits presented by DOE establish that the subpoenas issued to petitioners had various civil purposes, as well as the purpose of aiding in the determination whether to refer the matter to the Department of Justice for criminal investigation. The civil purposes for which information was sought include determination whether to commence a civil enforcement proceeding and whether to seek civil penalties in such a proceeding, collection of evidence to support allegations in a civil enforcement proceeding, determination of an appropriate civil settlement amount for violations of DOE regulations, and determination whether a portion of a civil settlement should be denominated a penalty (Whieldon affidavit of Feb. 11, 1982, paras. 6 and 15, R-198 to R-200; Wiener affidavit of Feb. 11, 1982, para. 7, R-203).

2. As noted above, a panel of the District of Columbia Circuit, in a decision issued several months after the TECA decision that petitioners challenge, reversed its earlier conclusion that the district court had jurisdiction under Section 645 of the DOEOA, 42 U.S.C. (Supp. IV) 7255, to enforce the subpoenas at issue. *United States* v. *Hill*, 694 F.2d 258 (D.C. Cir. 1982), rehearing denied (Jan. 14, 1983). The government has not yet determined whether to petition for a writ of certiorari in that case.

Whether or not the government decides to file a petition in *Hill*, it is clear that the sole question raised by petitioners in this case does not warrant plenary review. Accordingly,

the Court should deny the petition for a writ of certiorari.[8] In the alternative, the Court may wish to hold the petition in this case until the government reaches a determination whether to seek certiorari in *Hill*. Should the Court decide to hold the petition, we will file a supplemental memorandum advising the Court of our decision in *Hill*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]The petition in this case should be denied even if the government decides not to seek a writ of certiorari in *Hill*. Petitioners contend (Pet. 11-12) that this Court should vacate the decision of the TECA and remand the case for consideration in light of the jurisdictional ruling of the District of Columbia Circuit in *Hill*. But petitioners did not present the issue of the district court's jurisdiction as a question for review by this Court. See Sup. Ct. R. 21.1(a). Assuming that petitioners could appropriately challenge the TECA decision on the basis of *Hill*, such a challenge would more properly be made by means of a collateral attack on the TECA decision at some later time, in the event that the TECA decision affects petitioners' substantial rights. In this regard, we note that, if the government does not obtain review of *Hill* by this Court, it does not intend to pursue further its efforts to enforce the subpoenas against petitioners in the United States District Court for the District of Columbia. Accordingly, there is no reason for this Court now to become involved in determining the validity of the TECA judgment when the question presented by the petition is not otherwise worthy of review.

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